78-1472

No.

Supreme Court, U. S.
FILED
MAR 23 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Douglas M. Costle, Administrator of the United States Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 586 F.2d 650.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1978. The government's petition for rehearing with suggestion of rehearing en banc was denied on November 24, 1978. By order dated February 12, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to March 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide "opportunity for public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact.

STATEMENT

1. The Federal Clean Water Act (also known as the Federal Water Pollution Control Act), 33 U.S.C. 1251 *et seq.*, establishes "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. 1251(a)(1). Section 301(a) of the Act, 33 U.S.C. 1311(a), makes unlawful the discharge of any pollutant into the navigable waters of the United States, the contiguous zone, or the ocean,[1] except in compliance with the

[1] See the definitions in Section 502(7), (8), (9), (10), and (12) of the Act, 33 U.S.C. 1362(7), (8), (9), (10), and (12).

specific requirements of the Act. Such compliance may be achieved by obtaining a permit issued by the Administrator under Section 402 of the Act, 33 U.S.C. 1342.

Section 402 establishes the National Pollutant Discharge Elimination System (NPDES). Section 402(a)(1) authorizes the Administrator, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, on the condition, among others, that the discharge will meet the requirements of Section 301(b), 33 U.S.C. 1311(b). At all times material to this case, Section 301(b)(1)(B) required that no later than July 1, 1977, "publicly owned treatment works" meet "effluent limitations based upon secondary treatment" and defined by the Administrator.[2]

EPA has promulgated regulations (40 C.F.R. Part 125) implementing the "opportunity for public hearing" required by Section 402(a)(1). The regulations provide for three basic steps. First, public notice is given of EPA's proposed issuance, denial, or modification of a permit. 40 C.F.R. 125.32. Second, if EPA's regional administrator finds that there is "a significant degree of public interest" in the proposed

[2] In 1977, Congress amended the Act to permit the Administrator to grant extensions of this deadline through, but no later than, July 1, 1983. Pub. L. No. 95-217, Section 56(c), 91 Stat. 1593. Section 45, 91 Stat. 1584 (33 U.S.C. 1311(i)). The amendment also permits the Administrator to modify the effluent limitations of Section 1311(a)(1)(B) with respect to discharges by publicly owned treatment works into marine waters. Section 44, 91 Stat. 1584 (33 U.S.C. 1311(h)).

action, he must hold a public hearing of the "legislative" type (at which any interested person may submit oral or written statements or data). 40 C.F.R. 125.34. Third, after that hearing, if one is held (or, if not, after the notice), the administrator must determine what action to take with respect to the proposed permit. 40 C.F.R. 125.35. Within ten days after this determination, any interested person may request an adjudicatory hearing with respect to any "material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." 40 C.F.R. 125.36(b), (c). A request for an adjudicatory hearing must state with particularity the reasons for the request and the issues proposed to be considered. 40 C.F.R. 125.36(b)(2). Any interested person may also request legal rulings by EPA's General Counsel with respect to the proposed action. 40 C.F.R. 125.36(m). Within 90 days after EPA makes a final determination, any interested person may obtain judicial review in the appropriate court of appeals of the Administrator's issuance, denial, or modification of a permit. 33 U.S.C. 1369(b)(1). Otherwise, the terms and conditions of the permit are not subject to judicial review. 33 U.S.C. 1369(b)(2).

2. In November 1974, EPA issued to respondent City of Los Angeles a permit to discharge treated sewage from the city's Hyperion treatment plant into the Pacific Ocean.[3] EPA published notice of its

[3] Since 1960, sewage from Los Angeles has been processed at the Hyperion Wastewater Treatment Plant in Los Angeles and discharged into the Pacific Ocean. Most of the sewage has received only primary treatment. About one-third of the sewage has received additional secondary treatment. The metals and other solids removed during treatment, called "sludge," have been pumped through a seven-mile outfall pipe and discharged into the Pacific Ocean. The treated sewage has been discharged into the ocean through a five-mile outfall. A one-mile outfall has been used only in emergencies (see App. A, *infra*, 3a-4a).

Section 402(b) provides that the responsibility for issuing NPDES permits for discharges into navigable waters may be assumed by a state if it has an approved program, as California does. See generally *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976). A federal permit is still required for discharges more than three miles from the coastline. Therefore, EPA permits are required for Hyperion's discharges through its five- and seven-mile outfalls. The California Water Quality Control Board also requires a state permit for these outfalls under a state water pollution statute. Cal. Water Code § 13260 (West 1971).

intent to issue the permit, provided an opportunity to submit written comments, and held a public hearing on its proposed action (App. A, *infra*, 4a). Neither the City of Los Angeles nor any other respondent filed written comments on the proposed permit or voiced objections at the public hearing. No one requested an adjudicatory hearing.

On August 18, 1975, EPA rescinded the 1974 permit and issued a new permit with a compliance schedule that gradually reduced the amount of sewage sludge which could be discharged from the Hyperion plant.[4] Once again, EPA published advance public

[4] The 1975 permit set target dates for eliminating the sludge in three phases: (a) elimination of no less than one-third of the sludge by April 1, 1977; (b) elimination of no less than an additional one-third by October 1, 1977, and (c) termination of the discharge of sludge by April 1978 (A.R. Exh. 1 at

notice of its tentative determination to revise the permit and held a hearing on the proposed revisions (See A.R. Exh. 1 at 4).[5] Once again, none of the respondents presented either written or oral objections to the new permit or requested an adjudicatory hearing. No one sought judicial review of EPA's issuance of this permit, and 90 days thereafter, its terms and conditions were no longer subject to judicial review. 33 U.S.C. 1369(b)(2).

3. On April 26, 1977, EPA advised the City of Los Angeles that EPA proposed to modify the 1975 permit by extending its expiration date to December 17, 1979, without otherwise disturbing its terms and conditions (A.R. Exh. 9-10).[6] Public notice of EPA's proposed action, including an invitation to submit

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10, 16; see note 5, *infra*). This schedule would have resulted in compliance with Section 301 effluent limitations and Section 403 ocean-discharge criteria.

[5] "A.R." refers to the administrative record certified to the court of appeals by EPA pursuant to Rule 17 of the Federal Rules of Appellate Procedure. This record includes the 1975 permit and materials pertaining to the time extensions made in 1976 and 1977. The evidentiary materials relied on in 1975 in establishing the compliance schedule are part of a separate administrative record not certified to the court of appeals. In the court of appeals, the record was supplemented to include the materials reproduced in Appendices B-E, *infra*. These materials include Mr. Kilroy's request for an adjudicatory hearing, his brief in support of that request and EPA's responses.

[6] Permits may be issued for any period up to five years. 33 U.S.C. 1342(b)(1)(B). The 1975 permit originally had an expiration date of February 1, 1977. On application by the City of Los Angeles for an extension, on January 24, 1977, EPA extended the permit to June 30, 1977 (A.R. Exh. 7).

comments and to request a hearing, was published in the Los Angeles Times, April 27, 1977 (A.R. Exh. 12).[7] Neither respondents nor anyone else filed written comments or requested a hearing, and no hearing was held (App. A, *infra*, 6a). On June 2, 1977, EPA issued a final determination to extend the permit (A.R. Exh. 15).

On June 13, 1977, respondent John B. Kilroy, Sr., represented by attorneys for respondent Pacific Legal Foundation (PLF), filed a "request for an adjudicatory hearing pursuant to 40 C.F.R. Section 125.36" (App. B, *infra*). Pacific Legal Foundation is a public-interest law firm located in Sacramento, California (PLF Pet. For Review at 1-2). Mr. Kilroy is a resident of the Los Angeles area (*id.* at 2). The present proceedings is the second of three proceedings PLF has brought against EPA regarding sludge disposal by the City of Los Angeles wherein it has sought to prevent the City of Los Angeles from using a landfill, located in Palos Verdes, for the disposal of sludge (*id.* at 3).[8] In the present case, the

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[7] In addition to requiring EPA to publish its notice in a newspaper of general circulation, 40 C.F.R. 125.32(a) permits any person to request in advance that EPA send him individual notice of any proposed action within a designated state or geographical area. Respondents made no such request for individual notice of proposed actions concerning the Hyperion plant. The City of Los Angeles, as the permittee, received an individual notice. The other respondents received no notice other than the published notice (A.R. Exh. 12).

[8] The first lawsuit unsuccessfully sought to enjoin EPA from funding the landfill project on the theory, among others, that no environmental impact statement was prepared by EPA with respect to its decision to fund the project. EPA volun-

hearing request was filed only by Kilroy. None of the other respondents—PLF, the City of Los Angeles, and the City of Torrance—made such a request. Kilroy's request automatically stayed the effectiveness of the permit modification pending disposition of the request. See 40 C.F.R. 125.35(d)(2).

The regional administrator determined that Kilroy's request raised only issues of law, which he certified to the EPA General Counsel in accordance with 40 C.F.R. 125.36(m). See App. C, *infra*, 29a-30a.[9] Kilroy then submitted a brief to the General Counsel in support of his argument that the permit modification was defective as a matter of law (App. D, *infra*, 31a-41a). His brief did not contend that he

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tarily agreed, however, to prepare such a statement. *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), appeal pending, No. 77-3844 (9th Cir.). PLF's most recent complaint is pending in the district court in Los Angeles. *PLF* v. *Andrus*, No. 78-3463 (C.D. Cal.). It alleges, among other things, that diversion of sludge from the ocean to the landfill, allegedly due to the sludge-out schedule in the 1975 permit, violates the Endangered Species Act, 16 U.S.C. 1536, because gray whales feed on plankton, which feeds on the sludge; because brown pelicans feed on anchovies, which feed on plankton, which feed on the sludge; and because trucks going to and from the landfill kill the El Segundo Butterfly.

[9] The request stated (App. C, *infra*, 26a) that the "issues to be raised" at the adjudicatory hearing would be (1) "whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in the NPDES permit[ ] is being evaluated in an EIS and [whether] the compliance schedule should not be mandated until the EIS is completed," and (2) "whether the procedures used and the record developed were adequate [to issue] an NPDES permit."

desired to raise anything other than the following issues of law (App. D, *infra*, 31a-32a):

1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.* [10]

The General Counsel ruled (App. E, *infra*) that EPA may extend the expiration date of a permit through a modification. Section 301 permits may be issued for terms up to five years. So long as the

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[10] The brief made four arguments (App. D, *infra*, 33a-41a): (1) EPA has no authority to extend the expiration date of a permit because it is authorized only to issue a new permit, (2) although the Act permits "modifications," a time extension is not a "modification," (3) the action taken by the regional administrator therefore was the issuance of a new permit, and (4) the permit contained a sludge-out schedule that was then under evaluation in an environmental impact statement in connection with the funding of the landfill, and no decision on the schedule should be made pending completion of the environmental impact statement.

total duration of the extended permit does not exceed five years, she reasoned, a modification may include a time extension. The General Counsel also held that the fact that an environmental impact statement was being prepared in connection with the funding of the landfill project did not preclude extension of the permit. The Act expressly provides that EPA's actions on permits are exempt from NEPA. 33 U.S.C. 1371(c).

4. A petition for review of the Administrator's action was filed in the court of appeals by PFL, Kilroy, and the City of Torrance (No. 77-2909). A similar petition was filed by the City of Los Angeles (No. 77-3008), and the petitions were consolidated.

The court of appeals did not question that EPA had complied with its notice-and-hearing regulations (see App. A, *infra*, 4a-7a). The court did not take issue with EPA's interpretation of Kilroy's hearing request as raising only legal issues, or with the ruling of EPA's General Counsel rejecting Kilroy's legal arguments (see *id.* at 7a).

Nonetheless, the court held that EPA had denied petitioners an "opportunity for public hearing" within the meaning of Section 402(a)(1) (App. A, *infra*, 16a-22a). The court held that EPA, before it may issue, revoke, or modify an NPDES permit, generally must hold an adjudicatory hearing, even when no one has requested one. For EPA to escape this general rule in a particular case, "[i]t must be shown that the

material facts supporting the decision are not subject to dispute" (*id.* at 19a) and that a hearing would be "futile" and would serve "absolutely no purpose" (*id.* at 20a). The court acknowledged that "this is a not inconsiderable burden to place on the agency," but considered it "appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made" (*id.* at 19a-20a).

The court suggested that there were certain facts "that may be disputed and with respect to which the record in this case is silent" that would affect the reasonableness of the compliance schedule in the extended permit (*id.* at 20a). The court said it could "conclude unequivocally neither that the parties have no dispute about these matters nor that they do" (*id.* at 21a). Consequently the court was "unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed" (*ibid.*). In remanding the proceeding to the Administrator "to conduct such a hearing" (*id.* at 21a), the court did not limit the remand to the factual issues it had suggested. Pending the disposition of the case on remand, the court continued its stay of the compliance schedule embodied in the extended NPDES permit for the Hyperion plant.[11]

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[11] The court also continued its stay (by orders dated December 23, 1977, and March 29, 1978) of EPA's separate enforcement action against the City of Los Angeles for alleged violations of that schedule. *United States* v. *City of Los Angeles*, No. 77-3047HP (C.D. Cal., filed Aug. 12, 1977).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that EPA must hold an adjudicatory hearing before taking action on an NPDES permit whenever there are issues of material fact that "may be disputed," regardless of whether anyone has requested such a hearing, is contrary to the express language of Section 402(a)(1) and to decisions of this Court. The decision places an intolerable burden on the operations of EPA—and of state agencies as well—in administering the NPDES system.

1. Section 402(a)(1) requires the Administrator to provide an "opportunity for public hearing" before taking action on an NPDES permit. A statutory "opportunity" for a hearing is an opportunity; it does not require a hearing in every instance. *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39-44 (1964); *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Ass'n*, 356 U.S. 282, 287 (1958); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). Nor does it preclude an agency from establishing reasonable prerequisites for granting a hearing, and "barring at the threshold those who [do not] measure up to them." *FPC* v. *Texaco, Inc.*, *supra*, 377 U.S. at 39; see also *Weinberger* v. *Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *United States* v. *Storer Broadcasting Co.*, *supra*, 351 U.S. at 205.

A requirement such as that provided in 40 C.F.R. 125.36(b) and (c), *supra*, requiring that interested persons submit a request for a hearing and set forth the material issues of facts involved, is a reasonable prerequisite. Federal agencies need not conduct an adjudicatory hearing when no disputed issues of fact have been raised. *FPC* v. *Texaco, Inc.*, *supra*; *United States* v. *Storer Broadcasting Co.*, *supra*; *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281, 286-287 (8th Cir. 1959), cert. denied, 362 U.S. 911 (1960); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240-241 (5th Cir.), cert. denied, 358 U.S. 872 (1958).

The decision of the court of appeals conflicts in particular with this Court's decision in *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976). The statute involved there, Section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a)(3), provides (423 U.S. at 397):

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted * * *.

The mine operators in *Kleppe*, who had not requested a hearing, argued in this Court for "the

same type of formal findings of fact that are the usual product of the adversary hearing to which they have an absolute right, but which was waived by failure to make a request" (*ibid.*). In unanimously rejecting the argument, the Court stated (*id.* at 398):

> Section 109(a)(3) provides the mine operators with no more than "an opportunity" for a hearing. The word "opportunity" would be meaningless if the statute contemplated formal adjudicated findings whether or not a requested evidentiary hearing is held.
>
> * * * * *
>
> We therefore agree with the Court of Appeals that the language of the statute, especially when read in light of its legislative history, requires the Secretary to make formal findings of fact specified in § 109(a)(3) only when the mine operator requests a hearing. The requirement for a formal hearing under § 109(a)(3) is keyed to a request, and the requirement for formal findings is keyed to the same request.

So, here, where Section 402(a)(1) similarly provides no more than an "opportunity for public hearing," the hearing requirement "is keyed to a request." The power to compel a hearing by receiving notice and requesting a hearing, with a statement of the material issues of fact, constitutes the "opportunity" that the statute provides. The right to a hearing is waived by failure to request one.

Accordingly, since in this case no one requested a hearing in response to EPA's published notice of its

proposed action,[12] and even after that action no one requested a hearing to resolve issues of fact, no hearing on factual issues was required. The court of appeals erred in ruling otherwise. Indeed, the court should have limited its review of EPA's action to those issues that had been properly presented to the Agency, and thus should have determined only whether EPA correctly resolved the legal questions that Kilroy had raised.[13]

In holding that the "opportunity for public hearing" in Section 402(a)(1) need not be "keyed to a request," the court of appeals read the word "opportunity" out of the Act. Its decision will, in practice, require EPA routinely to hold adjudicatory hearings on NPDES permit actions, even where

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[12] EPA's notice-and-hearing regulations, as mentioned above (note 7, *supra*), give any person or organization the right to request in advance that EPA mail them individual notice concerning any matter. 40 C.F.R. 125.32(a). Respondents made no such request. Persons who choose not to make such a request must rely on newspaper notice. *Ibid.*

[13] Since the court of appeals did not question the validity of the notice procedure followed by EPA (40 C.F.R. 125.36), and since PLF, the City of Los Angeles, and the City of Torrance had presented no objections concerning the permit extension to the Agency, their petitions for review should have been dismissed. *McGee* v. *United States*, 402 U.S. 479 (1971); *Save the Bay, Inc.* v. *Administrator of EPA*, 556 F.2d 1282, 1289 (5th Cir.), reh'g en banc denied, 560 F.2d 1023 (1977). Kilroy did object to the proposed action before the Agency, but only on two legal grounds. The only question properly preserved by Kilroy for judicial review, therefore, was the validity of EPA's determinations of these two issues. *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499-500 (1955); *McGee* v. *United States, supra; Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

no one requests a hearing and even where the proposed action is, for example, only a time extension of a permit whose conditions have been fully considered at previous "legislative" hearings.[14] For if EPA holds no adjudicatory hearing, all a complainant need do in order to set aside the Agency's action, under the court's decision, is to suggest plausibly in the court of appeals that some members of the public might disagree concerning factual matters implicated by the Agency's action. Compare *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).

2. The court's acknowledgement that its decision places "a not inconsiderable burden" (App. A, *infra*, 19a-20a) on EPA is an understatement. In the next three years, EPA must reissue or extend an estimated 7,200 NPDES permits—600 of them within the Ninth Circuit.[15] In *United States Steel Corp.* v. *Train*, 556 F.2d 822, 834 n.14 (7th Cir. 1977), the Seventh Circuit noted that of more than 42,000 dischargers who had applied for NPDES permits, a "relatively small percentage of cases"—"about 2,000"—had involved requests for adjudicatory hearings. The court observed that if EPA were required to conduct an adjudicatory hearing on "a substantial proportion" of permit proceedings, "the entire permit program would have become hopelessly

[14] A public hearing of that type was held in 1975 on the terms and conditions of the permit at issue here. See pages 5-6, *supra*.

[15] These figures do not encompass an estimated 20,000 dischargers who are required to obtain NPDES permits but have not yet been issued one.

bogged down before the agency * * *." *Id.* at 834 n.14; see also *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132-133 (1977).[16]

Moreover, it is not only EPA's permit proceedings, but also proceedings conducted by state agencies under the NPDES program, that will be affected by the court's decision. Under Section 402(b)(3) of the Act, 33 U.S.C. 1342(b)(3), a state which administers an approved NPDES program must

> insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and * * * provide *an opportunity for public hearing* before a ruling on each such application. [Emphasis added.]

Since the italicized language is the same as the language in Section 402(a)(1) that was construed by the court of appeals, the court's decision apparently means that state agencies administering NPDES programs will be under the same burden the court has imposed on EPA.

[16] In this case and in *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253 (1978), the Ninth Circuit has held that the "hearing" referred to in Section 402 must comply with the full panoply of procedural rights provided by the Administrative Procedure Act, 5 U.S.C. 554, 556-557 (see App. A, *infra*, 17a). If, however, EPA regulations implementing the hearing requirement of Section 402 are valid, as we contend, an adjudicatory hearing need only be held upon a request which presents material issues of fact. 40 C.F.R. 125.36(b), (c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-2909

PACIFIC LEGAL FOUNDATION, a nonprofit California corporation; JOHN B. KILROY, SR.; and CITY OF TORRANCE, a municipal corporation, PETITIONERS

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

No. 77-3008

THE CITY OF LOS ANGELES,
a municipal corporation, PETITIONER

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

Before: MERRILL and SNEED, Circuit Judges, and EAST,* District Judge.

[Aug. 9, 1978]

SNEED, Circuit Judge:

This case presents a challenge to the Environmental Protection Agency's (EPA) action in extending the

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* Hon. William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

terms of the National Pollutant Discharge Elimination System (NPDES) permit applicable to the Hyperion Wastewater Treatment Plant in Los Angeles for an additional two and one-half years. Petitioner City of Los Angeles argues that the State of California, not the EPA, has jurisdiction over the discharges in question and that the joint permitting procedure used by the state and the EPA is not authorized by the statute. Petitioner Pacific Legal Foundation (PLF) initially questions EPA authority to extend the expiration date of an NPDES permit PLF also argues that the extension process was procedurally inadequate because no hearing was held and that the Administrator's action in extending the permit was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law. We have carefully considered these challenges, but must reject most of them. We do, however, remand this proceeding to the Administrator for an adjudicatory hearing as required by the Administrative Procedure Act (APA), 5 U.S.C. §§ 554, 556 and 557, with respect to EPA's extension of the NPDES permit.

I.

Background

A. Statutory Framework.

The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq., (FWPCA) provides that the discharge of any pollutant shall be unlawful except as in compliance with the specific

requirements of the act. Section 301, 33 U.S.C. § 1311. The statute also specifically provides that obtaining an NPDES permit authorizes such discharge. Section 402, 33 U.S.C. § 1342. The FWPCA further allows the states to assume responsibility for granting NPDES permits for discharges into navigable waters within the state's jurisdiction. Section 402(b).

These NPDES permits can only be obtained if the resulting discharge will meet other applicable requirements of the FWPCA. One of these requirements is that publicly-owned treatment works achieve effluent limitations based upon secondary treatment by July 1, 1977. Section 301(b)(1)(B). Ocean discharges are further required to be in compliance with guidelines developed by the EPA after consideration of a wide range of environmental, health, esthetic, recreational and economic values. Section 403, 33 U.S.C. § 1343. Disposal of sewage sludge which would result in any pollutant from such sewage sludge entering the navigable waters is also prohibited except pursuant to a permit. Section 405(a), 33 U.S.C. § 1345.

B. Physical Setting.

Sewage from Los Angeles is processed at the Hyperion Wastewater Treatment Plant and the resulting products are discharged into the Pacific Ocean. Most of the sewage receives only primary treatment; the resulting effluent is discharged into the ocean through an outfall extending five miles into the Pacific. About

one-third of the sewage is given additional secondary treatment and the resulting sludge is discharged through a seven mile long outfall. A third outfall of one mile is used only in emergencies.

C. Administrative Action.

On March 26, 1973, the EPA and the California State Water Resources Control Board entered into an understanding which gave the state primary responsibility for administering the NPDES program in California, but allowed the EPA to retain jurisdiction over discharges beyond the limits of the three-mile territorial sea. *See* p. 9 *infra*. The initial NPDES permit for the Hyperion plant was jointly issued by the EPA and the California Regional Water Quality Control Board, Los Angeles Region (CRWQCB). This permit, issued after a public hearing, authorized discharges from the one and five mile outfalls on the condition that effluent limitations based on full secondary treatment be attained by October 1, 1979. On August 18, 1975, a new permit was jointly issued which authorized discharges from all three outfalls. The 1974 permit was explicitly rescinded at this time. The new permit retained the compliance schedules designed to achieve full secondary treatment of wastewater and added a compliance schedule designed to eliminate all ocean discharge of sewage sludge within thirty months after concept approval of a plan for alternate disposal of the sludge. Conditional approval of the use of the Palos Verdes

landfill as an alternate disposal site was given by the EPA on October 11, 1975.

During the next two years the CRWQCB, apparently acting alone, amended the compliance schedule contained in the 1975 permit three times. The first change was to insert definite dates in the sludge-out compliance schedule, with elimination of sludge discharge into the ocean required by April 1, 1978. After the city missed the first interim deadlines in early 1976, the compliance schedule was again amended by the state to delay final elimination of slude discharge until April 1, 1980. The final change, made in late 1976, merely extended one of the interim dates in the compliance schedule, while retaining April 1980 as the ultimate sludge-out date.

On July 29, 1976, the EPA notified the City of Los Angeles that the NPDES permit for Hyperion would expire on February 1, 1977 and that a new permit would have to be obtained if discharges were to continue past that date. On July 30, 1976, the city submitted an application for a new permit to the CRWQCB. A duplicate copy of this application was sent to the EPA. However, on January 24, 1977, after a public hearing, the EPA and the CRWQCB jointly changed the expiration date of the existing permit from February 1, 1977 to June 30, 1977. The stated reason for the extension was that adequate review time for a new permit was not available. The record also indicates that both agencies were aware of action in Congress which might extend the compliance dates applicable to this project. The extension was seen as a way of avoiding issuing a new permit

that might be quickly outdated by changes in the underlying law.

Prior to the extention of the permit expiration date to June 30, 1977, petitioner PLF had written to the Regional Administrator of the EPA protesting the secondary treatment and sludge-out requirements in the Hyperion permit. This letter asserted that the EPA was misinterpreting the requirements of the FWPCA and that a proper interpretation required that ocean discharge limitations be imposed only after a complete environmental, economic, and social assessment of the factors involved. This letter did not include any specific objection to the proposed extension of the permit, but instead objected generally to the existing permit conditions. The EPA responded to this letter after the January 24, 1977 extension had been granted, saying that it still held to its interpretation of the FWPCA and therefore would not change any of the permit conditions.

By the end of April 1977 the EPA had decided to extend the existing permit until December 17, 1979. The City of Los Angeles was notified of this proposal and a general public notice was published in the Los Angeles Times. PLF, because it had not specifically requested to be on the mailing list for notice of proposed action regarding the Hyperion plant, did not receive individual notice of this proposal. No written objections to the extension were filed nor was a public hearing requested. On May 23, 1977, at a public hearing, the CRWQCB officially extended the expiration date of its permit until December 17, 1979. The

EPA permit was officially extended on June 2, 1977 with no further public notice or hearing. Petitioner Kilroy requested an adjudicatory hearing on the permit extension on June 13, 1977. The EPA denied this request because it found that no factual questions suitable to resolution at an adjudicatory hearing were presented by the request. The legal questions raised by Kilroy regarding the proper interpretation of the FWPCA were certified to the EPA General Counsel. EPA's legal position was set forth in a memo from the General Counsel issued on October 18, 1977.

On August 18, 1977, a petition for review of the Administrator's action was filed in this court by PLF and Mr. Kilroy. A similar petition was filed by the City of Los Angeles on August 31, 1977. These petitions were consolidated by order of this court on December 23, 1977. That order also stayed the terms, conditions and requirements of the permit pending final disposition of these consolidated cases.

II.

Appellate Court Jurisdiction.

A. Modification or Issuance.

We are faced initially with the question of whether we have jurisdiction to hear this case. Section 509(b)(1)(F) of the FWPCA, 33 U.S.C. § 1369(b)(1)(F), provides that "review of the Administrator's action in *issuing or denying* any permit under section 402 may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial

district in which such person resides or transacts such business" (emphasis added). The Administrator's *extension* of the expiration date of a permit clearly is not *expressly* included in the list of reviewable actions.

Section 509 generally has been strictly construed. The Second Circuit has held that it does not grant jurisdiction to review state action in issuing or denying an NPDES permit under section 402(b). *Mianus River Preservation Committee* v. *EPA*, 541 F.2d 899 (2d Cir. 1976). Both this Circuit and the Fifth Circuit have held that the Administrator's action in vetoing or failing to veto a permit granted by a state does not come within the scope of the term "issuing or denying any permit." *State of Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978); *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977). Focusing on the fact that section 509 provides only for review of the Administrator's action, the *Mianus River* court held that since the permitting action involved in that case was carried out solely by the state, there was no action by the Administrator to review. Both *State of Washington* and *Save the Bay* reasoned that section 509 applies only to direct permitting activities of the Administrator and not to his discretionary review of state permitting decisions.

Here the question is different. The action is that of the Administrator and consists of extending a permit. As will appear in Part II.B. of this opinion, this extension by the Administrator is more than failing to veto the state-granted extension. The critical is-

sue, as we see it, is whether for the purposes of section 509(b)(1)(F) an extension amounts to an issuance. We know of no authority directly in point nor is the legislative history helpful. The proper resolution, we believe, is to treat a permit extension the same as a permit issuance. Functionally, there is no difference between reissuance of a permit for a certain period from the date of its expiration and an extension of the same permit for the same period. Therefore, we hold that we have jurisdiction under section 509(b)(1)(F) to review the Administrator's action in extending the permit.

This holding is a narrow one; it is not intended to suggest that any modification of an existing permit amounts to an issuance of the entire permit for the purposes of section 509(b)(1)(F). Modification alters the meaning and scope of only those provisions modified; extension affects all provisions by projecting their life.

An extension remains an issuance even when accompanied by modifications authorized by section 402(a)(3), 33 U.S.C. § 1342(a)(3); such modifications, however, when unaccompanied by an extension are not an issuance. The hallmark of issuance is its projection into the future beyond the reach of an existing permit. Modifications do not so project. In this manner a section 402(a)(1) issuance can and should be distinguished from a section 402(a)(3) modification.

Therefore, we repeat, the June 2, 1977 permit extension by the EPA was the *issuance* of a permit for the purposes of section 509(b)(1)(F).

B. Authority of EPA to Extend Permit.

Although the EPA in fact granted an extension of the permit, which for purposes of section 509(b)(1)(F) we are prepared to treat as an issuance, the City of Los Angeles sharply challenges the authority of the EPA to so issue such permit. It contends that authority to issue permits such as that with which we are concerned has been delegated to the State of California under Section 402(b) of the FWPCA, 33 U.S.C. § 1342(b), and that, as a consequence, the sole jurisdictionally effective extension was accomplished by the state. Under these circumstances, *State of Washington, supra* and *Mianus River, supra,* would deprive this court of jurisdiction to review state action under section 509(b)(1)(F).

The flaw in this argument, however, is that the state's extension was not the only juridically effective extension. The permit, as extended, applies to discharges *beyond* the "territorial seas," defined in section 502(8), 33 U.S.C. § 1362(8), as "the belt of the seas . . . extending seaward a distance of three miles." We hold that only the Administrator has authority to grant permits to such areas. Therefore, even if the Administrator's power over those portions of the permit applicable to navigable waters within the "territorial seas" is limited to vetoing state action, *State of Washington, supra* at 586-87, the permit extension, to be juridically effective in its entirety, requires additional action by the Administrator. This action is subject to review because, within the limits

of the Administrator's power, all provisions of the permit were reissued by the extension.

Our holding that only the Administrator has authority to grant permits beyond the "territorial seas" is required by the FWPCA. Section 402(b), 33 U.S.C. § 1342(b), authorizes a state "desiring to administer its own permit program for discharges into *navigable waters* within its jurisdiction" (italics supplied) to submit such a program to the Administrator for approval. The legislative history of the FWPCA makes clear that Congress intended for the states to the primary permitting authority. Section 101(b), 33 U.S.C. § 1251(b); A Legislative History of the Water Pollution Control Act Amendments of 1972, Serial No. 93-1, 93rd Cong., 1st Sess. (1973) Vol. 1 at 262 (hereinafter Leg. History). Nonetheless, "navigable waters" is defined to mean "waters of the United States, including the territorial seas," section 502(7), 33 U.S.C. § 1362(7), but not including explicitly either the "contiguous zone" or the "ocean," both of which, under the definitions of the FWPCA, occupy areas beyond the "territorial seas."

The "contiguous zone" embraces "the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone." Section 502(9), 33 U.S.C. § 1362(9). Article 24 of the Convention describes the "contiguous zone" as "a zone of the high seas contiguous to its territorial sea . . . ." 15 United States Treaties and Other International Agreements, Part 2, 1612 (1964). Finally, "ocean" is defined by

the FWPCA to mean "any portion of the high seas beyond the contiguous zone." Section 502(1), 33 U.S.C. § 1362(10). These two areas, the "contiguous zone" and the "ocean," clearly extend beyond the "navigable waters," the outer limits of which mark the extent of the power of the states to administer their own permit programs. Had Congress intended the power of the states to extend beyond the territorial seas it easily could have so provided. Having not done so, we can hold only as we have indicated. Beyond the territorial seas only the Administrator, we repeat, has authority to issue permits.

Our conclusion is further strengthened by the FWPCA's definition of the EPA's permit granting authority. The Administrator is authorized "to issue a permit for the discharge of any pollutant." Section 402(a)(1), 33 U.S.C. § 1342(a)(1). The term "discharge of a pollutant" is thereafter defined to mean "(A) any addition of any pollutant to *navigable waters* from any point source, (B) any addition of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source other than a vessel or other floating craft." (Italics supplied). Section 502(12), 33 U.S.C. § 1362(12). Again it is apparent that "ocean" and "contiguous zone" waters are not included within the scope of the term "navigable waters" as it is used in the FWPCA and therefore cannot be required by the state. Federal action is required.

Our view regarding the scope of the state's permitting authority is also supported by the legislative history. Section 402(a)(5), 33 U.S.C. § 1342(a)

(5), provides authorization for states to grant permits on an interim basis "for discharges into the navigable waters within the jurisdiction of such State." This description of the scope of state permitting authority is similar to the state authority granted by section 402(b) on a permanent basis. In the Report of the House Committee on Public Works, the subsection (a)(5) permit authority is limited to "discharges into the navigable waters within the jurisdiction of such State (but not in the contiguous zone or the ocean)." Leg. History at 813. Congress, no doubt, intended a similar limitation on state jurisdiction under section 402(b).

This conclusion is not undermined by section 402(c) which provides for the suspension of EPA permitting authority once a state permit program is authorized. The suspension affects only that which the state is permitted to exercise. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976) is relevant. There the Supreme Court ruled that state permitting authority did not extend to discharges from federal installations located in the state. The Court rejected an argument that section 402(c) necessarily required the EPA to suspend completely the issuing of permits for discharges in that state. *Id.* at 224-26 n.39. The Court found that since Congress did not intend for the states to have permitting authority over federal installations, permit authority over those installations should remain with the EPA. Similarly here, inasmuch as Congress did not intend for state jurisdiction to apply to discharges past the three-mile territorial sea, it is appropriate to hold that the

EPA retains jurisdiction to grant permits for such discharges.[1]

Inasmuch as the Administrator's June 2, 1977 action amounted to the issuance of a valid permit, we hold that under section 509(b)(1)(F) we have jurisdiction to consider the petitions before us.

III.

Federal-State Coordination of Permit Actions.

Our analysis results in the EPA retaining jurisdiction over both the five and seven mile outfall discharges, while the State of California has permitting authority over the one mile emergency outfall because it is within the three-mile territorial sea. Joint action seems the most sensible way of dealing with the problems created by this splitting of jurisdiction. We find nothing in the legislative history to suggest that such joint action is contrary to Congressional intent. On the contrary, there is strong support in the legislative history for a conclusion that Congress wanted to encourage a federal-state partnership for the control

[1] Petitioners point out the extensive debate in Congress over the interaction between the FWPCA and the Marine Protection, Research and Sanctuaries Act of 1972. They argue that since the FWPCA controls all discharges from outfall pipes, no matter how far out into the ocean the pipe extends, while the MPRSA covers all other ocean dumping, all jurisdiction retained in the FWPCA should be delegable to the states. We fail to see the logic of this reasoning. The regulation of ocean dumping is totally unrelated to the specific question here being considered.

of water pollution. Leg. History at 1279 (comments of Senator Montoya).

The Supreme Court in *EPA* v. *State Water Resources Control Board, supra,* recognized that problems of coordination might result from allowing both the EPA and the state to issue permits for discharges within the state. This did not impel the Court to alter its conclusion. It observed that "these possible problems of coordination . . . fail to provide an adequate basis for finding a clear congressional intention to subject federal dischargers to the degree of control inherent in adhering to state permit requirements . . . ." *Id.* at 221. Similarly here, we recognize the problems involved in coordinated action; nevertheless, we cannot hold under the terms of the FWPCA that joint action is improper and that all authority must be turned over to the state to avoid conflicts.

Joint action in this particular case is complicated by the structure of California law which in effect requires that all discharges from the Hyperion plant be covered by a state permit. The Porter-Cologne Act imposes on "any political agency or entity of this state discharging waste . . . outside the boundaries of the state in a manner that could affect the quality of the waters of the state" the duty to file information regarding the discharge. Calif. Water Code § 13260. Thereupon the regional water quality control boards are empowered to prescribe requirements governing the discharge. Calif. Water Code § 13263. Discharges from the five and seven mile outfalls "could affect the quality of the waters of the state"; thus, they are per-

haps subject to state permitting. The extent to which, and the circumstances under which, state authority over discharges at the five and seven mile outfalls may be preempted is not an issue before us.

Here we need only point out that, given the split jurisdiction over discharges from the Hyperion plant, coordination between the federal and state authorities is imperative. The record here, despite suggestions by the petitioners to the contrary, does not reflect a contumacious refusal by either authority to recognize this necessity.

IV.

Availability of an "Opportunity For Public Hearing."

Having held in Part II of this opinion that our jurisdiction properly was invoked pursuant to section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), it follows that our review of the extension must consider the issues that ordinarily arise on petitions to review the issuance of any permit pursuant to the authority of section 402, 33 U.S.C. § 1342.

Initially, this means that the application for review must have been made within ninety days of the issuance. This requirement was met in this case. The petitions were filed on August 18 and 31, 1977, well within ninety days from the June 2, 1977 date of issuance. Next, issuance must follow an "opportunity for public hearing." Section 402(a)(1). We hold that no proper "opportunity for public hearing" was provided in this case.

The analysis supporting this conclusion must commence with *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1262 (9th Cir. 1977), in which we held that the hearing provisions of the APA, 5 U.S.C. §§ 554, 556 and 557 were applicable to the issuance of section 402 permits.[2] Section 554(c) provides:

> "The agency shall give all interested parties opportunity for—(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."

The "opportunity" of which section 554(c) of the APA speaks is, by reason of *Marathon Oil Co.* v. *EPA*, *supra*, the "opportunity for public hearing" of which section 402(a)(1) of the FWPCA speaks.

In this case all parties agree that the EPA never conducted a hearing regarding the extension of the permit. The Administrator contends, however, that an "opportunity" was provided notwithstanding the absence of a hearing. He points to the fact that notice of the proposed extension and the availability of a hearing was published in the Los Angeles Times. Since no one requested a hearing, EPA argues, there was not significant public interest to necessitate holding a hearing. *See* 40 C.F.R. § 125.34(a).

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[2] Similar holdings have been made in U.S. Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977) and Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978).

The Administrator misconceives the showing that must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity of a hearing turns not only on the vigor with which interested parties clamor for one, but also on whether a showing has been made demonstrating that a hearing is unnecessary. *See United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971); *American Bancorporation, Inc.* v. *Board of Governors of the Federal Reserve System*, 509 F.2d 29, 37-38 (8th Cir. 1974). We find persuasive the observations of the court in *Independent Bank Ass'n of Georgia* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975) concerning the "opportunity for hearing" provision of section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8). The court stated:

> "The case law in this Circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute. The agency, however, carries a heavy burden of justification. Where Congress has plainly given interested parties the right to a full hearing, the agency must show that the parties can gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest."

Id. at 1220.

The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive.[3] It must be shown that the material facts supporting the decision are not subject to dispute.[4] We realize that this is a

[3] We recognize that National Independent Coal Operators Association v. Kleppe, 423 U.S. 388, 397-98 (1976) suggests in dictum that a failure to request a hearing waives any right to a hearing and that the power to require a hearing by a request therefor constitutes "an opportunity" for a hearing. That case, however, involved the assessment of penalties against coal mine operators found to have unsafe conditions in their mines pursuant to the Federal Coal Mine Health and Safety Act of 1969. The failure of the operator in that situation to object to the fine almost inevitably leads to the conclusion that he is not disputing any of the facts underlying the action. In the case before us, while the failure of the city to request a hearing may suggest that it does not contest any of the facts supporting the issuance of the permit, the failure of PLF and Kilroy to request a predecision hearing does not lead to the same conclusion. Newspaper notice may not reach all interested parties. Interested citizens may not realize that they need to request a hearing if they are interested in an issue. Particularly in light of the known public opposition to use the Palos Verdes landfill, we are unwilling to say that the mere failure to request a predecision public hearing is decisive of the question whether a hearing need be held.

[4] The Supreme Court has held that in some situations the burden of demonstrating that there are disputed issues of material fact may be placed on the party challenging the agency's action. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 620 (1973); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). These cases are inapposite here, however, because they involved situations in which established regulations clearly applied to preclude the petitioner's arguments from succeeding. In such a situation, placing the burden on the petitioner to show in fairly precise terms why a particular exception should be made will save the

not inconsiderable burden to place on the agency, but it is appropriate in view of the strong policy in favor of holding public hearings before an adjudicative decision is made. *Marathon Oil, supra,* at 1261-62.

We cannot say a hearing prior to the June 2, 1977 extension would have served "absolutely no purpose" nor can we say that a hearing subsequent to a remand of this case would be futile. We reach this conclusion after assuming, *arguendo*, that section 301 of the FWPCA, 33 U.S.C. § 1311, requires the elimination of the discharge of sludge in the ocean and that the water pollution problems of disposal of sludge on land have been made a responsibility of the State of California pursuant to the section 402(b) delegation discussed in Part II.B., *supra. See Pacific Legal Foundation* v. *Quarles,* 440 F. Supp. 316 (C.D. Cal. 1977). Nonetheless, inasmuch as the permit given by the EPA and reissued by its letter of June 2, 1977 inevitably required cooperation between the EPA and the state with respect to the EPA's termination of the discharge of sludge in the ocean and its disposal by the state on the land, it is apparent to us that the reasonableness of the EPA's compliance schedule depends upon facts that may be disputed and with respect to which the record in this

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agency from having to conduct full evidentiary hearings only to deny routinely the application of the challenging petitioner for failure to meet an initial prerequisite. In the case before us, however, there is no such established rule setting forth specific prerequisites to a hearing. Whether an adequate "opportunity" has been provided must turn on a more subtle analysis of the entire situation.

case is silent. Such facts as the adequacy of the Palos Verdes or other landfill site, the ability of the city to acquire the capacity to transport the sludge within the time limits fixed by the permit, and the possible effect on navigable waters of land disposal are relevant to determining whether the sludge-out compliance schedule is supported by "substantial evidence." 5 U.S.C. § 706(a)(E) (1970).

Yet, on this record we can conclude unequivocally neither that the parties have no dispute about these matters nor that they do. Under these circumstances we are unable to deny an adjudicatory hearing on the ground that none of the material facts upon which the EPA's decision rests are disputed. Although ordinarily we might conclude that a silent record reflects no disagreement as to material facts, the special circumstances of this case cautions us against that course here. We acknowledge that, should a showing on remand be made in a proper manner that no dispute as to material facts exists, it would be necessary for us to reconsider our holding that no "opportunity for hearing" was provided.

Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency. It becomes both possible and tempting for each authority to deny responsibility by attributing the command in question to the other. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Con-

siderations such as these may properly influence our decision about whether a hearing in the situation before us would be useless.

We also note that petitioner Kilroy requested an adjudicatory hearing pursuant to 40 C.F.R. § 125.36 ten days after the decision to extend the permit was announced. A hearing allowing for reconsideration of the decision is clearly preferable to no hearing at all.

Finally, we are influenced by the fact that the record before us is barren of any explanation of the extension of June 2, 1977. Even if this were treated as a "modification" of a pre-existing permit under section 402(a)(3), we would confront a serious problem in determining whether the extension was arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A). An adjudicatory hearing undoubtedly will yield a record that will provide the reasons for the extension.

V.

Absence of Ocean Discharge Guidelines.

Before framing our remand of this case we must consider the petitioner's contention that the extension of the permit was invalid because it occurred at a time during which no guidelines established under section 403(c) of the FWPCA, 33 U.S.C. § 1343(c) existed. Section 403(a) provides:

> "No permit under section 402 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 402 of this title if the Administrator determines it to be in the public interest."

At the time the original permit was issued ocean discharge guidelines were in effect. These were rescinded on January 11, 1977 and new guidelines did not exist on June 2, 1977. The original permit was in compliance with the then existing guidelines.

Petitioners contend, and we agree, that the last sentence of section 403(a) does not provide the answer to their assertion of invalidity. This sentence is specifically designed to cover only the period befor the promulgation of the initial guidelines. Leg. History at 324. The problem we confront is different. Specifically, it is whether a permit, issued in compliance with then existing guidelines, validly can be reissued at a time during which the previous guidelines have been withdrawn for revision. We hold such reissuance to be valid. It is, by relation back to the original issuance, "in compliance with such guidelines" as the statute requires. We need not consider in this case the circumstances under which relation modifications that accompanied the extension. At some point an "extension" may become an original issuance rather than a reissuance. Such circumstances do not exist here, however.

VI.

The Remand.

The absence of a proper hearing requires us to remand this proceeding to the Administrator to conduct such a hearing.

This Court, by an order of December 23, 1977, stayed the NPDES permit pending the disposition of this case. Our order provided that the "terms, conditions and requirements" of the NPDES permit applicable to the Hyperion Treatment Plant are stayed with the "exception that effluent limitations which were applicable to the Hyperion Plant and which were in effect for the discharges from the Hyperion Plant on January 1, 1977, and monitoring and reporting requirements related thereto shall remain in effect to maintain the *status quo* and to ensure continued protection of the marine environment." This stay, again subject to the above exception, is continued pending a proper hearing. It shall terminate at such time following the hearing as the Administrator promulgates a new permit, extends that in effect on January 1, 1977, or terminates the permit.

REMANDED.

APPENDIX B

June 13, 1977

PMS PAUL DEFALCO JR REGIONAL DIRECTOR REGION IX UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RDM REPORT DELIVERY BY MAILGRAM, DLR
100 CALIFORNIA ST
SAN FRANCISCO CA 94111

REQUEST FOR AN ADJUDICATORY HEARING PURSUANT TO 40 CFR SECTION 125.36

1. NAME AND ADDRESS OF REQUESTOR

   JOHN B KILROY SR
   870 STRADA VECCHIA
   LOS ANGELES CA 90024

2. INTERESTS OF REQUESTOR

   MR KILROY AS A RESIDENT OF LOS ANGELES IS DIRECTLY AFFECTED BY ANY PROPOSAL SIGNIFICANTLY AFFECTING THE OPERATION OF THE HYPERION TREATMENT PLANT AND THE ENVIRONMENT OF THE LOS ANGELES AREA

3. PARTICIPATION BY REQUESTOR

   REQUESTOR AGREES TO COMPLY WITH THE TERMS OF 40 CFR SECTION 125.36(B)(2)(IV)

4. REASONS FOR THE REQUEST

   REQUESTOR ASKS THAT THE DECISION OF EPA TO EXTEND THE EXPIRATION OF NPDES PERMIT CA010991 BE SET ASIDE FOR THE FOLLOWING REASONS:

   1. THE 30 DAY NOTICE PRIOR TO HEARING (SECTION 125.32(A)) AND THE 30 DAY PERIOD FOR PUBLIC INPUT MANDATED BY 40 CFR SECTION 125.32(B)(1) WERE NOT COMPLIED WITH THERE-

FORE DENYING REQUESTOR AN OPPORTUNITY TO BE HEARD.

2. THE PROCEDURES FOR ISSUANCE OF AN NPDES PERMIT PURSUANT TO 40 CFR SECTION 125.2 ET SEQ. WERE NOT FOLLOWED, THERE ARE NO PROVISIONS IN THE REGULATIONS FOR THE EXTENSION OF THE EXPIRATION OF AN NPDES PERMIT.

5. ISSUES TO BE RAISED

REQUESTOR WOULD RAISE THE FOLLOWING ISSUES:

1. WHETHER THE REQUIREMENTS OF THE PERMIT SHOULD BE MODIFIED IN THAT THE PROJECT THAT IS THE SUBJECT OF THE COMPLIANCE SCHEDULE SET FORTH IN NPDES PERMIT CA010991 IS BEING EVALUATED IN AN EIS BY THE EPA PURSUANT TO THE REQUIREMENTS OF NEPA, THE COMPLIANCE SCHEDULE SHOULD NOT BE MANDATED IN AN NPDES PERMIT UNTIL THE NEPA STUDY IS COMPLETED; AND

2. WHETHER THE PROCEDURES USED AND THE RECORD DEVELOPED WERE ADEQUATE ISSUANCE OF AN NPDES PERMIT.

REQUESTOR WOULD PROPOSE TO SET ASIDE THE ACTION TAKEN TO EXTEND THE EXPIRATION DATE OF NPDES PERMIT CA010991 AND PROVIDE FOR FULL ADMINISTRATIVE PROCEDURES REQUIRED FOR THE ISSUANCE OF AN NPDES PERMIT.

DONALD M PACH ATTORNEY FOR JOHN B KILROY SR. PACIFIC LEGAL FOUNDATION 455 CAPITOL MALL SUITE 465 SACRAMENTO CA 95814

APPENDIX C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

100 California Street
San Francisco, California 94111

In Reply E-2
Refer to: HEA-1

CERTIFIED MAIL NO. 474683
RETURN RECEIPT REQUESTED

June 23, 1977

Donald M. Pach, Esq.
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, CA 95814

Subject: NPDES Permit No. CA0109991—
City of Los Angeles.

Dear Mr. Pach:

We are in receipt of your telegram dated June 13, 1977, requesting an adjudicatory hearing on the above subject permit on behalf of John B. Kilroy, Sr.

I have determined that the request does not set forth material issues of fact relevant to the question of whether a permit should be issued or modified, and that the request does not meet the requirements of

40 CFR 125.36(c)(1)(ii). I therefore deny the request, and my final determination remains in effect. The request does, however, present issues of law relating to interpretations of regulations promulgated under the Federal Water Pollution Control Act which should be referred to the General Counsel for decision pursuant to 40 CFR 125.36(m)(3). Therefore, I am certifying to the General Counsel for decision the issues of law raised by your request. A copy of my certification is enclosed.

Sincerely,

Original signed by
R. L. O'Connell
for Paul De Falco, Jr.
Regional Administrator

Enclosure

cc: City of Los Angeles (w/enc.)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

Docket No. IX-WP-77-4

IN THE MATTER OF:

National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
to CITY OF LOS ANGELES

CERTIFICATION OF ISSUES OF LAW

A request for an adjudicatory hearing, dated June 13, 1977, was received from Donald M. Pach, on behalf of John B. Kilroy, Sr., that raises the following issues of law which require a decision of the General Counsel pursuant to 40 CFR 125.36(m)(3):

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?

3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a

grant should be made to assist in the construction of the project?

Pursuant to 40 CFR 125.36(m)(2), each party may file a brief with the General Counsel within twenty (20) days of the date of this certification. The briefs shall contain:

(1) A subject index of the issues presented in the brief, with page references, and a table of statutes, cases, textbooks, and other material cited, with page references;

(2) A concise statement of each referred issue;

(3) A discussion of each issue, including arguments in favor of the referring party's position and citations to cases, statutes, legislative history, etc., tending to support such positions; and

(4) A recommended decision for each referred issue.

Forwarded herewith is a copy of the record of procedures and action taken in the modification of the subject permit by extending the termination date.

Dated: June 23, 1977

/s/ R. L. O'Connell
for PAUL DEFALCO, JR.
Regional Administrator

APPENDIX D

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Docket No. IX-WP-77-4

IN THE MATTER OF
National Pollutant Discharge
Elimination System (NPDES)
Permit No. CA0109991 Issued
To City of Los Angeles

BRIEF OF PACIFIC LEGAL FOUNDATION ON BEHALF OF JOHN B. KILROY ON CERTIFIED QUESTIONS TO GENERAL COUNSEL

[Table of Contents and Authorities Omitted]

INTRODUCTION

The issues of law certified to the General Counsel by the Environmental Protection Agency (EPA) Regional Administrator of Region IX are not an accurate reflection of the issues which would have been raised at the adjudicatory hearing requested pursuant to 40 C.F.R. § 125.36. Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues:

1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and

2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1281, *et seq.* (See Attachment A.)

ISSUES PRESENTED

John B. Kilroy (hereinafter requestor) will address, in part, issues two and three certified to the General Counsel. Issue two is as follows:

> "2. Must a detailed factual record be develeoped prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?"

In issue two, the Regional Administrator makes two assumptions: (1) that the extension of the expiration date of an NPDES permit is authorized, and (2) that it could be construed as a modification. Requestor denies the validity of both assumptions and will present his arguments in I and II below.

Issue three certified to the General Counsel is as follows:

> "3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?"

For clarity, requestor will divide his discussion of issue three into two parts. First, may the expiration date of an NPDES permit be extended (*i.e.*, without issuing a new permit) and second, should a project which is the subject of an EIS be mandated in a compliance schedule of an NPDES permit which is being newly issued where such schedule would require implementation prior to completion of the NEPA-EIS process? These issues will be addressed in arguments III and IV below.

ARGUMENT

I

EPA HAS NO AUTHORITY TO EXTEND THE EXPRIATION DATE OF AN NPDES PERMIT

Pursuant to 33 U.S.C. § 1342(a)(2), "the [NPDES] permit program of the Administrator . . . shall be subject to the same terms, conditions, and requirements as . . . permits issued . . . under subsection (b) . . . ." Subsection (b) is entitled "State permit programs." The Regional Administrator is subject to the requirements set out in subsection (b) and the regulations adopted pursuant to the applicable statutes.

Title 33, United States Code, § 1342(b)(1)(B) provides that NPDES permits are to be for *fixed* terms not exceeding five years. The regulations adopted pursuant to this authority, as set out in 40 C.F.R. §§ 124.51 [1] and 125.25(c)[2], make it clear that it is the intent of EPA to issue an NPDES permit for a fixed term. The use of "term" in this context is separate and distinct from the use of the word "terms" found in other parts of the applicable statutes and regulations. As used to describe the duration of an NPDES permit, "fixed term" is clear and unambiguous. The date of issuance will fix the beginning date and the ending date will fix the expiration date. Upon the expiration of the fixed term, set forth in the permit pursuant to the mandates of 33 U.S.C. § 1342(b) and 40 C.F.R. §§ 124.51 and 125.25 (c), the permit will no longer be in force. To continue to discharge after the expiration date of the fixed term, the permittee must apply for issuance of a new permit.[3]

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[1] 40 C.F.R. § 124.51. "Duration of issued NPDES permits."
"Any State or interstate agency participating in the NPDES shall provide that each issued NPDES permit shall have a fixed term not to exceed 5 years."

[2] 40 C.F.R. § 125.25(c). "Duration of permits."
"(c) All permits will be for a fixed term."

[3] *See* Attachment B hereto, correspondence from Stanley Leibowitz, Chief, General Services Section, EPA, to Donald Tillman, Los Angeles City Engineer, regarding the expiration of Permit No. CA0109991 and the necessity to obtain a new permit and Donald Tillman's response to that communication.

EPA is bound by both the applicable statutes and regulations. Both the statutes and regulations mandate that an NPDES permit be for a fixed term, which by definition precludes EPA from extending the expiration date of an existing permit. An example would be appropriate to ilustrate the abuses which could result if EPA were allowed merely to extend the expiration date of a permit. Suppose that an NPDES permit were issued for a 90 day fixed term. The public would not be too alarmed at such a short duration, and there would probably be no challenge to the pollutants being discharged. If at the end of the 90 day period, EPA extended the expiration date for four years and nine months, which period would not exceed the maximum duration of a permit, then the public could only contest the extension of the permit and not the limitations, restrictions, conditions, and other terms in the permit.[4] It was not the intent of Congress to allow for this type of absurd situation to arise, and yet, if the Regional Administrator's interpretation of his action is allowed to stand it is possible for it to occur. It is recommended that the General Counsel issue a decision that EPA is without authority to extend the expiration date of an existing NPDES permit because of the clear and unambiguous language of the applicable statutes and regulations and the possibility for excessive abuses on the part of EPA.

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[4] 40 C.F.R. § 125.36, Adjudicatory Hearings.

II

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR CANNOT BE CONSTRUED AS A MODIFICATION TO AN ISSUED NPDES PERMIT

In question two[5] certified to the General Counsel, the position taken by the Regional Administrator is that the extension of the expiration date of an NPDES permit is a modification of the permit. Incorporating Argument I above, it is contended that the extention of an expiration date cannot be a modification within the framework of the applicable statutes or regulations.

The statutes[6] are definite as to what modifications may be made to an issued NPDES permit. Subpart

[5] "Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extention of the permit's expiration date?"

[6] Title 33, United States Code, § 1311(c) provides:

"(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the econmoic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

Title 33, United States Code, § 1342(b)(1)(C)(iii) provides that a permit can be terminated or modified for:

"(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." *See also* 33 U.S.C. §§ 1342(b)(1)(C)(i), 1342(b)(1)(C)(ii).

C (40 C.F.R. §§ 125.21-125.28) of the regulations adopted by EPA sets forth the terms and conditions of an NPDES permit. The regulations allow for modification of effluent limitations (40 C.F.R. § 125.28), treatment standards (40 C.F.R. § 125.28(a)(2)), and schedules of compliance (40 C.F.R. § 125.23(d)), which are the terms and conditions upon which an NPDES permit will be issued for a fixed term. It would be anomalous indeed for the expiration date of a permit to be modifiable in the face of the statutes and regulations which provide for issuance of a new permit upon expiration and the statutes and regulations which set out the specific terms and conditions of a permit which are modifiable. The expiration date is conspicuously omitted as a modifiable term.

It is urged that the General Counsel determine that the expiration date of an NPDES permit is not subject to modification. By definition the expiration date must be fixed and is thus not modifiable. Upon expiration, issuance of a new permit is the statutorily and regulatory prescribed method of action.

III

THE ACTION TAKEN BY THE REGIONAL ADMINISTRATOR WAS THE ISSUANCE OF AN NPDES PERMIT

Incorporating the above arguments, the action taken by the Regional Administrator regarding NPDES Permit No. CA0109991 was the issuance of

a new NPDES permit. This conclusion is supported by the provisions of 40 C.F.R. § 125.2(a)(1). The regulations in 40 C.F.R. § 125 "do not prescribe policy or procedures for the issuance of permits by States under programs approved by the Administrator. . . ." (40 C.F.R. § 125.2(b).) NPDES Permit No. CA0109991 was issued by EPA and it appears that the position taken by EPA is that 40 C.F.R. § 125 would apply. (*See* Attachment B.)

It is recommended that the General Counsel determine that the action taken by the Regional Administrator was to issue a new NPDES permit for discharges of pollutants from the Hyperion Treatment Plant previously permitted under NPDES Permit No. CA0109991 which expired on February 1, 1977. As such, the Administrator failed to comply with applicable regulations and erroneously denied John B. Kilroy's petition for an adjudicatory hearing.

IV

A PERMITTEE SHOULD NOT BE FORCED TO IMPLEMENT A PROJECT CONTAINED IN A COMPLIANCE SCHEDULE WHEN THAT PROJECT IS BEING STUDIED IN AN EIS

NPDES Permit No. CA0109991, issued to the City of Los Angeles for the Hyperion Treatment Plant, includes in the schedule of compliance an interim sludge management project which is to be evaluated in an EIS being prepared by EPA in compliance with the

requirements of NEPA and FWPCA. (*See* Attachment C at 3-4.) If EPA continues to mandate the interim sludge management project and the EIS prepared for the project indicates another preferred, more environmentally sound alternative, an irreversible commitment of resources may occur and the NEPA process rendered purely academic, contrary to the intent and policies of NEPA.

On June 3, 1977, the State Water Resources Control Board of California determined that the Secondary Treatment Standards set pursuant to Pub. L. No. 92-500 would require large expenditures for no measurable water quality benefit. (*See* Attachment D at 2.) The interim sludge management project for the Hyperion Treatment Plant is primarily based on requirements set pursuant to EPA's interpretation of 33 U.S.C. § 1311(b)(1)(B). If the primary basis for a project is determined in an EIS to be environmentally unsound, the project's adverse environmental impacts should be mitigated, where feasible. In the instant case, evidence has been presented which casts doubt on the propriety of going forward with this project. Moreover, implementation of the project prior to completion of the NEPA process forecloses any opportunity to expeditiously mitigate any negative environmental consequences. It is incumbent upon EPA to avoid taking action which could cause an irreversible and irretrievable loss of resources.

There is the absence of any compelling need to implement the interim sludge management project prior to completion of the NEPA process. In *Flint Ridge*

v. *Scenic Rivers Association*, —— U.S. ——, 8 E.R.C. 2137 (1976), the Supreme Court held that where statutory limitations preclude preparation of an EIS, then the absence of an EIS will not bar an agency action. In the instant case there is no statutory or regulatory time limit on implementation of the project. NEPA requires that all federal agencies comply "to the fullest extent possible" with the directives of 42 U.S.C. § 4332. Here, EPA has not complied with the dictates of NEPA. An interim project is being mandated which could cause an irreversible and irretrievable commitment of resources when there is no stautory time limit to preclude the prior preparation of an EIS and full evaluation of each alternative, including no project.

Requestor recommends that General Counsel determine that a project which is being studied in an EIS should not be mandated until the EIS has been completed and comments received.

CONCLUSION

There is no statutory authority for the Regional Administrator to extend the expiration date of an NPDES permit, or to treat the extension of the expiration date as a modification. The statutes and regulations unambiguously provide for issuance of a permit for a fixed term, and upon expiration of the term for the issuance of a new permit.

The Regional Administrator has not complied to the fullest extent possible with the dictates of NEPA.

The potential irreparable and irreversible commitment of resources mandated by the implementation of the interim sludge project prior to completion of an EIS defies both logic and the law. It is recommended that the General Counsel adopt this position and provide guidance for future disputes which may arise under FWPCA.

DATED: July 12, 1977.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
THOMAS E. HOOKANO

By /s/ Thomas E. Hookano
THOMAS E. HOOKANO

Attorneys for Requestor

Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

[Attachments Omitted]

APPENDIX E

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

DECISION OF THE GENERAL COUNSEL ON MATTERS OF LAW PURSUANT TO 40 C.F.R. SECTION 125.36(m)

No. 66

In the matter of National Pollutant Discharge Elimination System Permit for the City of Los Angeles, CA0109991, the Regional Administrator has certified three issue of law to the Office of General Counsel for decision pursuant to 40 C.F.R. Section 125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions,[1] present the following issues.

ISSUES OF LAW NO. I AND II

Questions Presented

1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

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[1] Briefs were filed by EPA Region IX and by the Pacific Legal Foundation on behalf of John B. Kilroy.

2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date? [2]

Decision

EPA has the authority to extend the expiration date of an NPDES permit by modification of the permit. In any permit modification proceeding an opportunity for public hearing must be provided, but a hearing must be held only if the Regional Administrator finds that there is a significant degree of public interest in the permit modification. Since Kilroy does not specifically argue that the record supporting the permit modification is inadequate this question need not be addressed.

Discussion

On April 27, 1977 a notice of a proposed modification of the NPDES permit issued to the City of Los Angeles for its Hyperion sewage treatment plant was published in the Los Angeles Times. The proposed change was to the expiration date of the permit, which was then June 30, 1977. On June 2, 1977, the

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[2] Kilroy urges that I address the following issue:

> Whether there is authority under the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CAO109991 was the issuance of a new permit.

permit was modified to extend its expiration date to December 17, 1979. No requests for a public hearing prior to modification of the permit pursuant to 40 C.F.R. § 125.34 were made. On June 13, 1977, John B. Kilroy requested an adjudicatory hearing pursuant to 40 C.F.R. § 125.36. That request was denied but three issues of law were referred to the General Counsel.

Kilroy is correct in arguing that federally-issued NPDES permits, no less than State-issued permits, are subject to the requirement that they be for fixed terms not exceeding five years. FWPCA § 402(b)(1)(B) read in conjunction with § 402(a)(3)), 40 CFR § 125.25. But this does not resolve the questions he raises. This requirement of the statute, and EPA regulations, does not forbid modification of the expiration date of a permit, so long as the permit, as modified, as a fixed expiration date and that date is no more than five years from the date it was established. The purpose of § 402(b)(1)(B) is clear; to insure that at intervals not greater than five years the terms and conditions of a permit be subject to reevaluation by the Agency (or State) and that the public have an opportunity to participate in this reevaluation.[3] This purpose is not compromised by a modification of an expiration date such as occurred here, since in no event will more than five years elapse

[3] While the proposed change in a permit may be only to its expiration date, any issue relevant to the extension, such as whether the requirements placed on the discharger should be modified, could be raised.

between opportunities for the Agency, and the public, to decide whether the requirements placed on the discharger should be changed.[4]

Kilroy also argues that the FWPCA and EPA regulations provide authority to modify only certain provisions of a permit and do not provide such authority with regard to the expiration date. But the Act, in § 402(b)(1)(C), says only that permits must be subject to modification for cause, without restricting the power to modify to any particular terms of a permit. Similarly, the three specific causes for modification set out in § 402(b)(1)(C) are clearly inclusive, rather than exclusive. And 40 C.F.R. § 125.22(a)(2) provides that a permit may, for cause, be modified "in whole or in part". Nothing in the statute or regulations expressly or implicitly forbids modification of expiration dates of permits.[5]

[4] Kilroy argues that the ability to modify the expiration date can be abused and used to frustrate the public participation requirements of the Act. Kilroy argues primarily in terms of hypothetical situations, however, and has failed to show that the practical ability of the public to participate in this particular proceeding was infringed. Whether or not abuse may occur in another situation must await another day.

[5] The provisions of 40 C.F.R. § 125.23(d) cover a particular situation when permits may be modified but do not in any way limit the Agency's ability to modify other terms and conditions. Section 125.28, characterized by Kilroy as a permit modification provision, is actually a provision for *adjustment* of effluent limitations or standards to reflect, on a case by case basis, credit for pollutants in intake water. It serves the function, therefore, of defining the terms of a permit, rather than of changing them subsequent to permit issuance. Section 301(c) of the Act serves a similar function with respect

With regard to any permit modification, including a modification of an expiration date, the Agency is required to provide public notice of its intent to modify the permit and must provide an opportunity for a public hearing *See* 40 CFR §§ 125.22(a)(2), 125.32, 125.34. In addition, any interested person may request an adjudicatory hearing pursuant to § 125.36. Thus, the right of the public to be periodically apprised of the status of a discharger's permit and to participate in the permitting process is amply assured. But a public hearing need not necessarily be held. Section 402(b)(3) of the Act provides only that the public "receive notice of each application for a permit and . . . *an opportunity* for a public hearing before a ruling on each application. . . ." (emphasis added.)[6] This is precisely what the Agency's regulations provide. Section 125.32 requires public notice of the proposed issuance or modification of a permit while § 125.34 of EPA's NPDES regulations provides that the Regional Administrator *may* hold a public hearing when he determines either that there is a significant degree of public interest in a permit (§ 125.34(a)) or when he determines that a hearing may provide useful information (§ 125.34(d)). At least where there is little or no public interest ex-

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to defining BATEA for dischargers who lack the economic capability to meet the national effluent limitations guidelines. Section 301(c) variances will not modify permits, but will be relevant to the requirements to be established in permits which will expire on or after July 1, 1983.

[6] *Cf.* The Administrative Procedure Act, 5 U.S.C. §§ 553(c), 554(a), 554(c).

pressed after public notice of a proposed modification the question of whether to hold a public hearing prior to modification of the permit is wholly discretionary.

Finally, it may be observed that Kilroy has failed to show that his legal arguments have any practical implications. Whether EPA modified the old permit or issued a new one has not been shown to have any bearing on the public participation procedures to be followed. In either case public notice would be given and opportunity for public and/or adjudicatory hearings provided. In particular, it does not appear that Kilroy's own request for an adjudicatory hearing would have had to be handled any differently.

Issue of Law No. III

Question Presented

May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule of the permit is being evaluated by EPA in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?[7]

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[7] Kilroy phrases the issue as:

> Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1281, *et seq.*

Decision

EPA has the authority to extend the expiration date of a permit which orders a permittee to go forward with a project despite the fact that the same project is being evaluated in an Environmental Impact Statement (EIS) for the purpose of determining whether a grant should be made to assist in the project's construction.

Discussion

The only legal obstacle to requiring Los Angeles to proceed with the sludge management project which Kilroy appears to raise is that it would conflict with NEPA. But § 511(c) of the FWPCA clearly provides that the EIS requirements of NEPA do not apply to the permit at issue here. The permit for the Hyperion plant is neither a grant of federal financial assistance nor a permit for a new source as defined in Section 306(a)(2) of the FWPCA. Obviously, if NEPA does not apply to the permit issuance it does not apply to extension of the expiration date.

Recently, in *Pacific Legal Foundation* v. *Quarles*, No. 77-521-HP (C.D. Cal. July 20, 1977) the court, dealing with issues raised with regard to the very permit involved here, held that, "the language of Section 511(c) leads to the conclusion that the EPA can, without an EIS, order Los Angeles to build the interim sludge disposal project while the EPA is prevented, until it prepares an EIS, from awarding a grant to help pay for the project." Slip op. at 6.

There thus appears to be no reason why the pendency of the EIS concerning funding of the sludge management project causes any legal problems to arise with regard to the NPDES permit.

October 18, 1977

/s/ Joan Z. Bernstein

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 289411 364